

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 1296 of 1995****WITH****SPECIAL CIVIL APPLICATION No.3108 of 1995****For Approval and Signature: sd/-****HON'BLE MS.JUSTICE H.N.DEVANI**

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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MADANLAL GOVINDRAM CHHOTMURAD & 4 - Petitioner(s)
Versus
AMBALAL H PATEL & 1 - Respondent(s)

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Appearance :**IN SPECIAL CIVIL APPLICATION NO.1296/1995 :**

MR SUNIL MEHTA FOR MR SK BUKHARI for Petitioners
MS TRUSHA PATEL FOR MR AJ PATEL for Respondent No: 1.
NONE PRESENT for Respondent No(s).: 2.

IN SPECIAL CIVIL APPLICATION NO.3108/1995 :

MS TRUSHA PATEL FOR MR AJ PATEL for Petitioners
MR SUNIL MEHTA FOR MR SK BUKHARI for Respondent No.1
RULE SERVED for Respondent No.2 - Absent
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CORAM : HON'BLE MS.JUSTICE H.N.DEVANI

Date : 11/08/2005

CAV JUDGMENT

1. In both these petitions, the judgement and order dated 20.7.1994 passed by the Gujarat Revenue Tribunal (Tribunal) in Revision Application No.TEN BA 83 of 1990 is subject matter of challenge and the parties to both the petitions are common, hence, both the petitions were heard together and are disposed of by this common order.
2. In Special Civil Application No.1296 of 1995, the petitioners therein have challenged the aforesaid order of the Tribunal only to the extent the Tribunal has observed that "The only right which the applicant gets is that he continues to be the tenant of the suit survey number and the custodian could not cancel the lease or allotment of the evacuee property as he was empowered under Section 12 of the Evacuee Property Act"; whereas in

Special Civil Application No.3108 of 1995, the petitioner therein has challenged the aforesaid order of the Tribunal as well as the order passed by the Deputy Collector (Land Reforms) (Appeals) Kheda, which was confirmed by the Tribunal and seeks restoration of the order dated 22.10.1981 passed by the Mamlatdar and Agricultural Lands Tribunal, Khambhat. For the sake of convenience the petitioners of Special Civil Application No.1276 of 1995 are referred to as the petitioners, and the petitioner of Special Civil Application No.3108 of 1995 is referred to as the respondent No.1.

- 2.1 The common facts involved in both the petitions are that the father of the respondent No.1 had become a deemed purchaser of land admeasuring Acres 5-10 gunthas, bearing Survey No.681 of village Nagra, Taluka Khambhat, District Kheda (hereinafter referred to as the subject lands). The tenancy in his favour was created in the year 1928; and he had since being cultivating the subject lands. It appears that there are entries in the revenue record evidencing cultivation of the subject lands by the father of the respondent

No.1, as tenant.

2.2 The aforesaid lands admeasuring 5 Acres and 10 guthas, bearing Survey No.681 of village: Nagra, Taluka: Khambhat, District: Kheda, came to be declared as evacuee property under the provisions of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as the Evacuee Property Act) and the same were allotted to one Rahermal Khajomal, the predecessor of the petitioners, vide a certificate dated 29.11.57, under the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, (hereinafter referred to as the Displaced Persons Act). The petitioners made efforts to obtain possession of the said lands from the respondent No.1, namely Ambalal Hirabhai Patel and his forefathers; however, they failed to get back the possession. It is the case of the petitioners, that as the lands were allotted to the petitioners, the respondent No.1 was an unauthorised occupant of the said lands.

2.3 The respondent No.1 made an application under Section 32G of the Bombay Tenancy and Agricultural

Lands Act, 1948 (hereinafter referred to as the Tenancy Act) before the Additional Mamlatdar & Agricultural Lands Tribunal, Khambhat (hereinafter referred to as the Mamlatdar) for the purpose of fixing the purchase price of the subject lands. The application was numbered as Tenancy Case No.98 of 1981. Before the Mamlatdar, it was contended by the respondent No.1 that he was a permanent tenant of the said land under the provisions of the Tenancy Act and was therefore, entitled to purchase the said land under Section 32 G of the said Act. The Mamlatdar, by his order dated 22.10.1981, fixed the purchase price and issued necessary consequential directions in accordance with the provisions of the Tenancy Act.

- 2.4 Being aggrieved by the aforesaid order dated 22.10.1981, the petitioners preferred an appeal before the Deputy Collector (Land Reforms) (Appeals), Kheda (hereinafter referred to as the Deputy Collector) being Tenancy Appeal No.282 of 1988. The Deputy Collector, by an order dated 21.7.1989, allowed the appeal and set aside the order of the Mamlatdar and Agricultural Lands Tribunal.

2.5 The respondent No.1, challenged the order of the Deputy Collector by way of a revision application before the Gujarat Revenue Tribunal (hereinafter referred to as the Tribunal), being Revision Application No.TEN BA 83 of 1990. By a judgement and order dated 20.7.1994, the Tribunal rejected the Revision Application filed by the respondent No.1, however, while rejecting the said application, the Tribunal observed as follows:

"The only right which the applicant gets is that he continues to be the tenant of the suit survey number and the custodian could not cancel the lease or allotment of the evacuee property as he was empowered under Section 12 of the Evacuee Property Act."

2.6 The petitioners are aggrieved by the aforesaid judgement and order dated 20.7.1994 to the extent of the aforesaid observations only, whereas the respondent No.1 is aggrieved by the rejection of his revision application.

3. Heard Ms. Trusha Patel for Mr. A.J. Patel, the learned Advocate appearing on behalf of the

petitioner in Special Civil Application No.3108 of 1995 and on behalf of the respondent No.1 in Special Civil Application No.1296 of 1995 and Mr. Sunil Mehta for Mr. S.K. Bukhari, the learned Advocate appearing on behalf of the petitioners in Special Civil Application No.1296 of 1995 and on behalf of the respondent No.1 in Special Civil Application 3108 of 1995. Though served, there is no appearance on behalf of the respondent State authorities.

4. Ms. Trusha Patel, the learned Advocate for the respondent No.1 submitted that the undisputed facts of the case are that the subject lands belonged to one Naaz Begum and that one Shri Dahyabhai, the grandfather of the respondent No.1 was holding the subject lands as a tenant since 1928. That, pursuant to an inquiry made by the Mamlatdar under section 70(b) of the Tenancy Act, it was held that the grandfather of the respondent No.1 was a protected tenant and entry in respect of the same was made in the revenue record by mutation Entry No.1103. That, thereafter pursuant to inquiry under Section 70(b) of the Tenancy Act, the grandfather of the respondent No.1 was

declared to be a permanent tenant and entry to that effect was made in the revenue record, village form No.6 on 11.12.1966, by way of mutation entry No.2062. It was argued that the said mutation entries have not been challenged and have attained finality.

- 4.1 The learned Advocate submitted that in the year 1950, the said landlady migrated to Pakistan and the subject lands were declared to be Evacuee Property by a notification dated 28th February, 1954. That, the subject lands had been allotted to one Rahermal Khajomal, the predecessor of the petitioners on 29.11.57 under the Displaced Persons Act, as he had migrated from Pakistan. It was submitted that the possession of the subject lands had never been handed over to the predecessor of the petitioners, who was residing in Maharashtra since then. The learned Advocate submitted that upon the lands having been allotted to the said Rahermal Khajomal, the lands ceased to be evacuee property and the provisions of the Evacuee Property Act ceased to apply to the said lands. That, from 1957 the subject lands formed part of the compensation pool as the same were

allotted to the predecessor of the petitioners, therefore, there, was no question of non-application of the provisions of the Tenancy Act in respect of the said lands. Hence, the purchase price had rightly been fixed under the provisions of Section 32G of the Tenancy Act. The learned Advocate placed reliance upon a decision of the Apex Court in the case of *Basant Ram v. Union of India*, AIR 1962 SC 994 for the proposition that the consequence of a notification under Section 12(1) of the Displaced Persons Act, is that all rights, title and interest of the evacuees in the property ceased with the result that the property no longer remained evacuee property. Once the property ceased to be evacuee property, it cannot be dealt with under the Evacuee Property Act or the rules framed thereunder. The property became part of the compensation pool and could be dealt with under the provisions of the Displaced Persons Act.

- 4.2 The learned Advocate submitted that the overriding effect of the Evacuee Property Act does not affect the rights of the respondent No.1. It was submitted that there is a distinction between

evacuee and non-evacuee interest. That, what could be vested in the Custodian would be only an evacuee interest and the rights of the respondent No.1 would not be affected. In support of her contention, reliance was placed upon the decision of a Division Bench of this Court rendered in the case of *Pirdhandas Parsumal v. Hajrabai Mahomad*, (1968) 9 GLR 24, wherein it has been held that the vesting that is contemplated under Section 12(2) of the Evacuee Property Act is the vesting of the evacuee property, that is, the right, title and interest of the evacuee in the property and not the interest of the non-evacuee in the property.

- 4.3 The learned Advocate pointed out that sub-section (1) of Section 12 of the Evacuee Property Act empowers the Custodian to cancel any allotment or terminate any lease or amend the terms of any lease or agreement under which any evacuee property is held or occupied by a person, however, the proviso thereto provides that in case of any lease granted before the 14th day of August 1947, the Custodian shall not exercise any of the powers conferred upon him under the said sub-section and submitted that the said provision itself specifies

that tenancy prior to 1947 cannot be terminated. The learned Advocate submitted that the forefathers of the respondent No.1 held the subject lands much before 14th August 1947, hence, the Custodian did not have the power to terminate the tenancy of the respondent No.1. Accordingly, the respondent No.1 continued to be a tenant in relation to the subject land despite the same having vested in the Custodian under the provisions of the Evacuee Act.

- 4.4 It was submitted that in 1957 even if the property vested absolutely in the Central Government, even then on the date of allotment to the petitioners i.e. on 29.11.1957 the respondent No.1's tenancy was subsisting, hence the provisions of Section 88 would not come in his way. In support of her contention the learned Advocate placed reliance upon the decision of the Bombay High Court in the case of *Saheblal Chandbhai v. Chandanmal Kundanmal*, AIR 1979 Bombay 295, wherein the Court had followed an earlier decision where it had been held that the benefits of the Tenancy Act would be available to a tenant inducted on the land by the managing authority during the period of

management. It had been held that the only requirement was that such tenancy must have been subsisting on the date the management came to end.

- 4.5 The learned Advocate referred to the provisions of Section 89 of the Tenancy Act which provide for repeal of the enactments specified in the Schedule I thereto, and pointed out that by virtue of clause (b) of sub-Section (2) of Section 89, nothing in the act or any repeal affected thereby would, save as expressly provided by the Act affect or be deemed to affect any right, title, interest, obligation, liability already acquired, accrued or incurred before the commencement of the Act. It was contended that assuming that the provisions of Section 88 were applicable, even then there is a specific exclusion in Section 89(2)(b)(1) of the Tenancy Act. Reliance was placed upon the decision of the Supreme Court in the case of *Parvati v. Fatehsinhrao*, AIR 1986 SC 2204 in support of the proposition that the provisions of Section 88 of the Tenancy Act are not of a confiscatory nature so as to take away from the tenant the status of protected tenant already accrued to him. It was urged that the

Displaced Persons Act, cannot upset the rights of tenants to provide the same to others.

4.6 The learned Advocate also relied upon an unreported decision of this Court in Appeal from Order No.128 of 1972, dated 11.11.1975 to contend that if the Government does not continue to be the owner, the exemption embodied in section 88(1)(a) of the Tenancy Act would not be available and that in that event the Tenancy Act would be applicable to the subject lands.

4.7 The learned Advocate submitted that it was only the right, title and interest of the evacuee-property that vested in the Custodian. That, as the possession was always with the respondent No.1 in his capacity as tenant, it was only the occupancy rights of the evacuee-landlady that had vested in the Custodian. In conclusion it was submitted that the petition filed by the respondent No.1 was required to be allowed and that filed by the petitioners was required to be rejected.

4.8 Mr. Sunil Mehta, the learned Advocate for the petitioners submitted that the subject lands had been acquired by the Central Government under the provisions of the Displaced Persons Act. The respondent No.1 was the tenant of the subject lands which were held by the Central Government, and as such the provisions the Tenancy Act were not applicable to the subject lands, hence, the respondent No.1 had no right to purchase the subject lands, accordingly the Deputy Collector had rightly set aside the order of the Mamlatdar, and that the Tribunal was justified in rejecting the Revision Application filed by the respondent No.1.

4.9 The learned Advocate submitted that the Tribunal had erred in relying upon the decision of this Court reported in 9 GLR 24, as the said decision was rendered in relation to the question of residential accommodation where there were no prohibitory provisions like Section 88 of the Tenancy Act. That, the said decision cannot be made applicable to the facts and circumstances of the present as there is a prohibition under Section 88 of the Tenancy Act to the subject

lands. It was submitted that when the Tribunal had come to the conclusion that the respondent No.1 had no right to purchase the subject lands under the Tenancy Act, the question of permitting the respondent No.1 to continue as tenant did not arise at all. That, therefore the Tribunal had erred in holding that the respondent No.1 had the right to continue to be the tenant of the subject lands.

4.10 In support of his contentions the learned Advocate placed reliance upon the decision of the Supreme Court in the case of *Basant Ram v. Union of India* (supra) as well as the decision of the Bombay High Court in the case of *Promod Bhat v. Kanwar Raj*, *AIR 1954 Bombay 518*.

5. Upon perusal of the record of the case as available before this Court, it appears that grandfather of the respondent No.1 was in possession of the subject lands since 1928 and that there are entries to that effect in the revenue records. The subject lands were owned by one Naaz Begum, who migrated to Pakistan in 1950 and that even thereafter the father of respondent

No.1 continued to be in possession of the said lands. The subject lands had been declared to be evacuee property by a notification dated 11.7.1953 issued by the Deputy Custodian of Kheda under the provisions of sub-Section (4) of Section 8 of the Evacuee Property Act. Thereafter, the Central Government acquired the subject lands under the provisions of Section 12 of the Displaced Persons Act, whereupon the evacuee property vested in the Central Government free from all encumbrances. The evacuee property so acquired formed part of the compensation pool as provided under the provisions of sub-Section (4) of Section 12 of the said Act.

- 5.1 By an order dated 29.11.1957, the subject lands were allotted to Rahermal Khajomal, a migrant from Pakistan, under the provisions of the Displaced Persons Act. Despite several efforts Rahermal Khajomal could not acquire possession of the said lands. In the meanwhile, the Mamlatdar carried out an inquiry under Section 70(b) of the Tenancy Act and declared the father of the respondent No.1 to be a permanent tenant in relation to the subject lands, which was recorded in the record of rights by mutation entry No.2062 dated 11.12.66. The said

entry was certified on 26.9.67.

5.2 Rahermal Khajomal expired in 1979, and his heirs were brought on record.

5.3 On 12.10.1981, the petitioner's father Hirabhai Dahyabhai made an application under Section 32G of the Tenancy Act before the Mamlatdar, for determining the purchase price of the subject lands. The Mamlatdar, by his order dated 22.10.1981, fixed the purchase price of the subject lands. In the said order it was observed that the Talati-cum-Mantri, Nagra, had given a certificate that the land owners were not residing in the village and that their address was not known, hence, the matter was proceeded with exparte. The Mamlatdar held that the applicant is a permanent tenant, hence, the purchase price is required to be determined and accordingly, fixed the purchase price at Rs.300.16 ps.

5.4 Thereafter, it appears that the Deputy Collector had called for the papers of the aforesaid case and had opined that it was not necessary to exercise revisional powers under Section 76A of

the Tenancy Act in respect of the aforesaid order.

- 5.5 Being aggrieved by the aforesaid order dated 20.10.81 passed by the Mamlatdar, the petitioners after a period of more than six years preferred an appeal before the Deputy Collector on 1.8.88. The Deputy Collector by his order dated 31st July 1989, allowed the appeal and set aside the impugned order dated 22.10.81. The Deputy Collector held that there is no delay in preferring the appeal. That, there was an order of the Settlement Commissioner that the Tenancy Act is not applicable to agricultural lands of evacuees, which had been forwarded to all the departments, hence, the Mamlatdar ought not to have entertained an application under the Tenancy Act in respect of the subject lands. That, in view of the provisions of Section 4 read with Section 2(f) of the Evacuee Property Act, the provisions of the Tenancy Act would not apply to evacuee property and that, the impugned order is beyond the jurisdiction of the Mamlatdar. The Deputy Collector while allowing the appeal and setting aside the impugned order also held that upon entering the order in the revenue record the mutation entry No.2062 dated 11.12.1966

would automatically stand cancelled.

5.6 Being aggrieved by the aforesaid order of the Deputy Collector the respondent No.1 approached the Gujarat Revenue Tribunal by way of a Revision Application. The Tribunal by its order dated 20.7.1994 dismissed the revision application. The Tribunal followed the decision of this Court in the case of *Pirdhandas v. Hajrabai* (supra) and held as follows:

"8. The above cited case law is applicable to the present applicant only to the extent that he continues to be the tenant of the suit survey number. The purchasers cannot claim possession as right, title and interest of the original landlord who was evacuee. There is no provision in the Administration of Evacuee Property Act which may give fulfilled tenancy rights to the applicant. It is only due to the above cited case law that the applicant can claim to be the tenant of the suit survey number."

"11. The legal position is, therefore, very clear. Under the provisions of the Administration of Evacuee Property Act and Displaced Persons (Compensation and Rehabilitation) Act, the applicant does not get any right to purchase the suit survey number under the provisions of the Bombay Tenancy Act. The only right which the applicant gets is that he continues to be the tenant of the suit survey number and the custodian could not cancel the lease or allotment of the evacuee property as he was empowered under Section 12 of the Evacuee Property Act.

12. Considering the legal position involved in the present case and also

considering the case law cited by both the parties, it is very clear that the judgement and order passed by the Dy. Collector is quite legal and proper. In the result, I do not find any reason to allow the Revision Application which deserves to be dismissed. Hence, Order.

13. ORDER

Revision Application is dismissed."

5.7 The aforesaid order of the Gujarat Revenue Tribunal is subject matter of challenge in the present petitions.

6. For proper appreciation of the contentions raised in the petition, it would be necessary to take note of some of the material provisions of the Administration of Evacuee Property Act, 1950, the Displaced Persons (Compensation and Rehabilitation) Act, 1954 as well as the Bombay Tenancy and Agricultural Lands Act, 1948.

6.1 The Administration of Evacuee Property Act, 1950, was brought into force on 17.4.1951. From the preamble of the Act it appears that it is intended to be an Act to provide for the administration of evacuee property and for certain matters connected therewith. According to the Act, "evacuee

property", means any property of an evacuee (whether held by him as owner or as a trustee or as a beneficiary or a tenant or in any other capacity) and includes the property specified in sub-clauses (1) and (2) of Section 2(f). Property is defined to mean property of any kind and includes any right or interest in the property. The procedure for notifying evacuee property has been prescribed in Section 7. When any property, has been declared to be an evacuee property, Section 8 says that it shall be deemed to have vested in the Custodian for the State.

6.2 Section 4 of the Act which is a provision that has a material bearing on the point in question reads thus:

"4. Act to override other laws:

(1) The provisions of this Act and the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.

(2) For the removal of doubts, it is hereby declared that nothing in any other law controlling the rents of, or evictions from, any property shall apply, or be deemed ever to have applied, to evacuee property."

6.3 Section 12 of the Act which is another important provision insofar as the issue in question is concerned, reads as under:

"12. Power to vary or cancel leases or allotments of evacuee property.-

(1)Notwithstanding anything contained in any other law for the time being in force, the Custodian may cancel any allotment or terminate any lease or amend the terms of any lease or agreement under which any evacuee property is held or occupied by a person, whether such allotment, lease or agreement was granted or entered into before or after the commencement of this Act.

Provided that in the case of any lease granted before the 14th day of August 1947, the Custodian shall not exercise any of the powers conferred upon him under this sub-section unless he is satisfied that the lessee-

(a) has sublet, assigned or otherwise parted with the possession of the whole or any part of the property leased to him; or

(b) has used or is using such property for a purpose other than that for which it was leased to him; or

(c) has failed to pay rent in accordance with the terms of the lease.

Explanation.- In this sub-section, 'lease' includes a lease granted by the Custodian and 'agreement' includes an agreement entered into by the Custodian.

(2) Where by reason of any action taken under sub-section (1), any person has ceased to be entitled to possession of any evacuee property, he shall on demand by the Custodian surrender possession of such property to the Custodian or to any person duly authorised by him in this behalf.

(3) If any person fails to surrender possession

of any property on demand under sub-section (2), the Custodian may, notwithstanding anything to the contrary contained in any other law for the time being in force, eject such person and take possession of such property in the manner provided in Section 9."

6.4 The Displaced Persons (Compensation and Rehabilitation) Act, 1954 is an Act to provide for the payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. Clause (a) of Section 2 of the Act, defines "compensation pool" to be the compensation pool constituted under Section 14. Clause (c) defines "evacuee property" to be any property which has been declared or is deemed to have been declared as evacuee property under the Administration of Evacuee Property Act, 1950. Clause (h) provides that all other words and expressions used but not defined in this Act and defined in the Administration of Evacuee Property Act, 1950 have the meaning respectively assigned to them in that Act.

6.5 Section 12 of the Displaced Persons Act reads thus:

"12. Power to acquire evacuee property for rehabilitation of displaced persons.-(1)If the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose, being a purpose connected with

the relief and rehabilitation of displaced persons, including payment of compensation to such persons, the Central Government may at any time acquire such evacuee property by publishing in the Official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section.

(2) On the publication of a notification under sub-section (1), the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.

(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notifications referred to in sub-section (1) in respect of -

- (a) all evacuee property generally; or
- (b) any class of evacuee property; or
- (c) any evacuee property situated in a specified area; or
- (d) any particular evacuee property.

(4) All such evacuee property acquired under this section shall form part of the compensation pool.

Section 14 of the Act, which provides for compensation pool, reads as under:

14. Compensation pool.- (1) For the purpose of payment of compensation and rehabilitation grants to displaced persons, there shall be constituted a

compensation pool which shall consist of -

- (a) all evacuee property acquired under section 12, including the sale proceeds of any such property and all profits and income accruing from such property;
- (b) such cash balances lying with the Custodian as may, by order of the Central Government, be transferred to the compensation pool;
- (c) such contributions, in any form whatsoever, as may be made to the compensation pool by the Central Government or any State Government;
- (d) such other assets as may be prescribed.

(2) The compensation pool shall vest in the Central Government free from all encumbrances and shall be utilised in accordance with the provisions of this Act and the rules made thereunder.

Thus, on the publication of a notification under Section 12 of the Displaced Persons Act, the evacuee property, which formed part of the evacuee pool under the Evacuee Property Act, goes out of the evacuee pool and becomes part of the compensation pool and vests in the Central Government free from all encumbrances.

6.6 The Bombay Tenancy and Agricultural Lands Act, 1948 is an act relating to tenancies of agricultural lands, which was enacted for the purpose of improving the economic conditions of peasants or ensuring the full and efficient use of

land for agriculture.

6.7 Clause (10A) of Section 2 of the Tenancy Act defines 'permanent tenant' as follows:

"Permanent tenant" means a person-

(a) who immediately before the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955 (hereinafter called "the Amending Act, 1955"), -

(i) holds land as mulgenidar or mirasdar; or

(ii) by custom, agreement, or the decree or order of a Court holds the land on lease permanently; or

(b) the commencement or duration of whose tenancy cannot satisfactorily be proved by reason of antiquity;

and includes a tenant whose name or the name of whose predecessor-in-title has been entered in the record of rights or in any public record or in any other revenue record as a permanent tenant immediately before the commencement of the Amending Act, 1955.

Clause (18) of Section 2 of the Act defines "tenant" to be a person who holds land on lease and includes-

(a) a person who is deemed to be a tenant under section 4;

(b) a person who is a protected tenant; and

(c) a person who is a permanent tenant;

(d) a person who, after the surrender of his tenancy in respect of any land at any time after the appointed day but before the specified date has continued, or is deemed to have continued, to remain in actual possession, with or without consent of the landlord, of such land till the

specified date;

and the word "landlord" shall be construed accordingly;

Clause (16C) of Section 2 defines "specified date" to be the date of the coming into force of the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1972;

6.8 Section 4 of the Tenancy Act which provides for persons to be deemed tenants, reads thus:

4. A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not-

- (a) a member of the owner's family; or
- (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under personal supervision of the owner or any member of the owner's family, or
- (c) a mortgagee in possession.

Explanation (I). - A person shall not be deemed to be a tenant under this section if such person has been on an application made by the owner of the land as provided under section 2-A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a tenant.

Explanation II.- Where any land is cultivated by a widow or a minor or a person who is subject to physical or mental disability or a

serving member of the armed forces through a tenant then notwithstanding anything contained in *Explanation I* to clause (6) of section 2, such tenant shall be deemed to be a tenant within the meaning of this section.

Section 4 A of the Tenancy Act provides that for the purposes of the said Act, a person shall be recognized to be a protected tenant, if such person has been deemed to be a protected tenant under sections 3, 3A and 4 of the Bombay Tenancy Act, 1939 referred to in Schedule I to the said Act.

6.9 Section 32 of the Tenancy Act makes provision as regards tenants who are deemed to have purchased land on tillers' day and 32G of the Act provides for the Tribunal to issue notice and determine price of land to be paid by tenants.

6.10 Section 88 of the Tenancy Act insofar as the same is relevant for the purpose of the present petition reads as under:

88.(1) Save as otherwise provided in sub-section (2), nothing in the foregoing provisions of this Act shall apply-

(a) to lands belonging to, or held on lease from the Government;

Section 89 of the Act, as is relevant for the purposes of the present petition reads as under:

89. (1) The enactment specified in Schedule I is hereby repealed to the extent mentioned in the fourth column.

(2) But nothing in this Act or repeal effected thereby-

(a) shall affect the amendments made in section 59 of the Bombay Land Revenue Code, 1979, or sections 6 and 9 of the Khoti Settlement Act, 1880;

(b) shall, save as expressly provided in this Act, affect or be deemed to affect, -

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act,

and any such proceedings shall be continued and disposed of, as if this Act was not passed.

(3) ...

(4) ...

Schedule I to the Act as is relevant for the purpose of the present petition reads as under:

SCHEDULE I

*Enactment repealed.
(see section 89)*

Year	Short Title		Extent of Repeal
1	2	3	4
	XXIX	The Bombay Tenancy Act, 1939	The whole except sections 3, 3-A and 4 as modified in the following manner, namely:- (a) he has held such land continuously for a period of not less than six years immediately preceding either:- (i) the first day of January 1938, or (ii) the first day of January 1945, and (b) he has cultivated such land personally, during the aforesaid period. <i>Explanation I.</i>-If the person who has held such land on the first day of January, 1945, as the case may be, came to hold the same by inheritance or succession from another person or if he has held such land as a tenant and is an heir to such other person, the period during which such other person held such land as a tenant shall be included in calculating the period of six years under this section. <i>Explanation II.</i>-..... <i>Explanation III.</i>-.....

		Tenants on expiry of one years from coming into force of Bom. XXVI of 1946 to be deemed protected tenants. Bom. XXIX of 1939.	3A. Every tenant shall, from the eighth day of November 1947 be deemed to be a protected tenant for the purposes of this Act and his rights as such protected tenant shall be recorded in the Record of Rights unless his landlord has prior to the aforesaid date made an application to the Mamlatdar for declaration that the tenant is not a protected tenant. <i>Explanation.</i>-A person shall not be deemed to be a protected tenant if such person has been on an application made by the owner of the land as provided in section 3-A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a protected tenant.
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6.11 As can be seen, the subject lands were declared to be evacuee property by the notification dated 11.7.1953, issued by the Deputy Custodian of Kheda under the provisions of sub-section (4) of Section 8 of the Evacuee Property Act. Thereafter, the Central Government acquired the subject lands by publication of a notification under sub-section (1) of section 12 of the Displaced Persons Act, whereupon the right, title and interest of the evacuee in the evacuee property was extinguished and the evacuee property had vested absolutely in the Central Government free from all encumbrances. The evacuee property so acquired formed part of

the compensation pool as provided under the provisions of sub-section (4) of Section 12 of the said Act. This court in the case of *Pirdhandas v. Hajrabai* (supra) while construing the provisions of Section 12(2) of the Displaced Persons Act, has held as follows:

"8. The only question which then remains for consideration is as to whether the right of residence of the plaintiff in the two rooms in the suit house which constituted an interest in the suit house was extinguished by reason of the provision in section 12(2) that the evacuee property shall vest absolutely in the Central Government free from all encumbrances. It was urged on behalf of defendants Nos.5 and 6 that there were two expressions which were of the utmost significance in section 12(2) and they were "shall vest absolutely" and "free from all encumbrances". The argument was that the words "vest absolutely" were clearly indicative of the legislative intent that the whole of the evacuee property should vest in the Central Government in title as well as possession and in this connection reliance was placed on a decision of the Supreme Court in *P.&V. Merchants Union v. Improvement Trust, Delhi*, A.I.R. 1957 S.C. 344. Now we entirely agree that having regard to the context in which the words "vest absolutely" occur, it is clear that what was intended by the Legislature is that the evacuee property should vest in the Central Government not merely for a limited purpose but for all purposes and not merely in possession but also in title and that the vesting should be absolute and complete, but the vesting that is contemplated by the section is the vesting of evacuee property, that is, of the right, title and interest of the evacuee in the property and not of the interest of a non-evacuee in the property. The section deals only with the right, title and interest of the evacuee in the evacuee property and not with the

right, title and interest of a non-evacuee in the property. The definition of "evacuee property" in the Administration of Evacuee Property Act, 1950, clearly shows that only the right, title and interest of an evacuee in the property can be evacuee property and, therefore, when section 12(2) provides that on the publication of a notification under sub-section(1), the right, title and interest of the evacuee in the evacuee property shall be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances, what vests in the Central Government free from all encumbrances is evacuee property, that is, the right, title and interest of a non-evacuee. If this object and purpose of the section is borne in mind, the words "free from all encumbrances" do not present any difficulty of interpretation. It is no doubt true that the word "encumbrance" is a word of wide import and it would include *jus in re aliena*, that is, any right which limits or derogates from the right belonging to some other person in respect of the same subject matter and in that sense it would include even a mortgage or a lease which constitutes an interest in immovable property. But that is not the sense in which the word "encumbrance" appears to have been used in section 12(2). If the word "encumbrance" is given such wide meaning as to include any *jus in re aliena*, the effect of section 12(2) would be to affect interests of non-evacuees in evacuee properties, as for example, where a non-evacuee may be a mortgagee or a lessee. The interest of non-evacuee as a mortgagee or a lessee in such case would be extinguished without payment of any compensation and that surely is not a result which could have been intended by the Legislature. Moreover, section 19 of the Act clearly postulates the continuance of leases of evacuee properties effected prior to the publication of the notification under section 12(1) indicating beyond doubt that leases of evacuee property are not intended to be within the connotation of the word "encumbrance". The word "encumbrance" in our opinion does not include an interest in

the property and more particularly so when we find that the only thing which vests in the Central Government under the section is the right, title and interest of the evacuee in the property and not the right, title and interest of a non-evacuee. The true construction of section 12(2), therefore, is that on the publication of a notification under section 12(1), the right, title and interest of the evacuee in the property in question is extinguished and it vests in the Central Government: if any non-evacuee has any right, title or interest in the property, it is not affected and it does not vest in the Central Government and the right, title and interest of the evacuee in the property which vests in the Central Government, so vests free from all encumbrances on that right, title or interest. Anything which, as pointed out by Shah J. as he then was, in Shree Ambarnath Mills v. D.B. Godbole, (1957) 59 Bom. L.R. 309, prevent or impedes action in the exercise of that right, title and interest would be extinguished, but that would not include the right, title or interest of a non-evacuee in the property."

- 6.12 Applying the principles stated in the aforesaid decision of this Court to the facts of the present case, it is apparent that the learned Advocate for the respondent No.1 is right in contending that it is only the evacuee interest which had vested in the Central Government and that the same did not include the respondent No.1's interest in the subject lands in the capacity of tenant. As noted by the Court, Section 19 of the Displaced Persons Act categorically provides for continuance of leases of evacuee properties prior to the

publication of notification under section 12 (1) of the said Act, indicating that the leases of evacuee property are not intended to be within the connotation of the word "encumbrance". Thus, what vested in the Central Government was only the right, title and interest of the evacuee, Naaz Begum, and not the right of the respondent No.1 to cultivate the said lands as tenant. Accordingly the right of the respondent No.1 did not vest in the allottee Rahermal Khajomal or his successors and the respondent No.1 was entitled to enforce his right against the petitioners.

- 6.13 Reading Section 4 of the Evacuee Property Act in conjunction with Section 12 of the said Act, it can be seen that the provisions of the said Act have an overriding effect over the provisions of all other Acts insofar as they are inconsistent with the provisions of the Evacuee Property Act. However, all that Section 4 means is that if any particular provision in the Act or the rule or the order made there under is inconsistent with any other law for the time being in force, then the Court must give effect only to the provisions of the said Act and the rules or orders made under

the Act. It follows that the provisions of the Evacuee Property Act have to prevail over all other Acts in case of inconsistency. It does not give nor is it intended to confer any more or higher powers upon the Custodian than those that are already given under the provisions of that Act. It is settled legal position that the Custodian is the statutory agent of the evacuee, and in the absence of any specific provisions in the Evacuee Property Act, the powers of the Custodian are the same as were exercisable by the evacuee himself. Under Section 12 of the said Act, the Custodian has the power to cancel any allotment or terminate any lease or amend the terms of any lease or agreement under which any evacuee property is held or occupied by a person whether such allotment, lease or agreement was granted or entered into before or after the commencement of the said Act. However, the proviso to sub-section (1) of the said section carves out an exception, namely that the Custodian is not empowered to exercise the powers conferred upon him in case of any lease granted before the 14th day of August 1947, except in the eventualities provided thereunder.

6.14 The Supreme Court in the case of *Moola v. Financial Commissioner, Revenue 1980 (Supp) SCC 608*, while construing the provisions of Section 12 of the Administration of Evacuee Property Act, 1950 with the provisions of Section 9 of the Displaced Persons (Land Resettlement) Act, 1947 observed that "It clearly transpires from the proviso that if the lease in favour of the lessee was from a date prior to August 14, 1947, the Custodian will have no power to cancel the lease." In the present case, it is not in dispute that the forefathers of the respondent No.1 are holding the subject lands as tenants since 1928, i.e. long before 14th August 1947. It appears that it is in the aforesaid situation, that the Custodian has not been in a position to take over the possession of the subject lands and terminate the tenancy of the respondent No.1. Thus, even under the Evacuee Property Act, the rights of tenants prior to 14th August 1947 are protected and accordingly the respondent No.1 has continued to be in possession of the subject lands through out, whether the lands formed part of the evacuee pool or the compensation pool.

6.15 It has been contended on behalf of the petitioners that the subject lands had been acquired by the Central Government under the provisions of the Displaced Persons Act and that the respondent No.1 was a tenant of the subject lands which were held by the Central Government, hence, in view of the provisions of section 88 of the Tenancy Act, the provisions of the Tenancy Act were not applicable to the subject lands and that therefore, the respondent No.1 was not entitled to purchase the said lands. Clause (a) of sub-section (1) of Section 88 of the Tenancy Act provides that nothing in the foregoing provisions of the Tenancy Act shall apply to lands belonging to, or held on lease from, the Government. However, in view of the provisions of sub-section (1) of Section 89 read with Schedule I to the Tenancy Act, the provisions of Section 3 of the Bombay Tenancy Act, 1939, which makes provision for protected tenants, are not repealed. Moreover, in view of the provisions of sub-section (2) of Section 89 of the Act, nothing in the Act or any repeal affected thereby would affect or be deemed to affect any right, title, interest, obligation or liability

already acquired or incurred before the commencement of the said Act. Hence, despite the repeal of the Bombay Tenancy Act, 1939 the right of the respondent No.1 to be deemed to be a protected tenant in respect of the subject land is not affected. The Supreme Court in the case of *Sakharam v. Manikchand*, AIR 1963 SC 354 has held as follows:

"5. In the instant case, the right of a 'protected tenant' had accrued to the appellants while the Act of 1939 was still in force, without any act on their part being necessary. That right had been recognised by the public authorities by making the relevant entries in the Record of Rights, as aforesaid. On the other hand as already indicated, S.3A(1) of the Act of 1939 had given the right to the landlord-respondent to take proceedings to have the necessary declaration made by the mamlatdar that the tenant had not acquired the status of a 'protected tenant.' He did not proceed in that behalf. Hence, it is clear that so far as the appellants were concerned, their status as 'protected tenants' had been recognised by the public authorities under the Act of 1939, and they had to do nothing more to bring their case within the expression 'right accrued', in cl. (b) of S. 89(2) of the Act of 1948."

"6. The provisions of S. 88 are entirely prospective. They apply to lands of the description contained in cls. (a) to (d) of S.88(1) from the date on which the Act came into operation, that is to say, from December 28, 1948. They are not intended in any sense to be of a confiscatory character. They do not show an intention to take away what had already accrued to tenants acquiring, the status of 'protected tenants.' On the other hand, S. 89(2)(b), quoted above, clearly shows an intention to

conserve such rights as had been acquired or had accrued before the commencement of the repealing Act....."

The aforesaid decision was modified to a certain extent in the case of *Mohanlal V. Tribhuvan*, AIR 1963 SC 358 wherein it was held thus:

"5. It will be noticed that cls. (a), (b) and (c) of S. 88(1) apply to things as they were at the date of the enactment, whereas cl. (d) only authorised the State Government to specify certain areas as being reserved for urban non-agricultural or industrial development, by notification in the Official Gazette, from time to time. Under cls. (a) to (c) of S. 88 (1) it is specifically provided that the Act, from its inception, did not apply to certain areas then identified; whereas cl. (d) has reference to the future. Hence, the State Government could take out of the operation of the Act such areas as it would deem should come within the description of urban non-agricultural or for industrial development. Clause (d), therefore, would come into operation only upon such a notification being issued by the State Government.

If the facts of the present case are tested on the anvil of the principles stated above, the right as 'protected tenant' had accrued to the respondent No.1 while the Act of 1939 was still in force, without any act on his part being necessary. The right of the respondent No.1 had been recognised by the public authorities by making the relevant entries in the Record of Rights, which have remained unchallenged and attained finality. The Deputy Collector in proceedings under the Tenancy Act, could not have set at nought mutation entries made in the record

of rights under the provisions of the Bombay Land Revenue Code. Therefore, despite the repeal of the Bombay Tenancy Act, the status of the respondent No.1 as protected tenant continued. The subject lands were held by the evacuee subject to the rights of the respondent No.1. When the subject lands vested in the Custodian, what vested were the right, title and interest of the evacuee as distinguished from the rights of the respondent No.1 as protected tenant, which did not vest in the Custodian. Upon acquisition of the subject lands by the Central Government what vested in the Central Government was again the right, title and interest of the evacuee and not the interest of the respondent No.1 as tenant. This is fortified by the fact that despite ample powers having been conferred under the Evacuee Property Act as well as the Displaced Persons Act and the rules framed thereunder, neither the Custodian after the property vested in him under the Evacuee Property Act, nor the Central Government after acquisition of the property under the Displaced Persons Act or even the allottee after the lands were granted to him under the provisions of the said Act, appear to have at any point of time taken any steps under the Act or rules, to take over the possession of the subject lands. The respondent No.1 has throughout continued to be in possession and none of the authorities

under the Act appear to have taken any action which they could have taken to terminate the tenancy or to evict the respondent No.1 from the subject lands had it been otherwise. This leads to an inference that in view of the proviso to sub-section (1) of section 12 of the Evacuee Property Act, the respondent No.1 being in possession of the subject lands prior to 14th August 1947, the authorities were not in a position to terminate the lease. Nothing to the contrary appears to have been brought on the record.

- 6.15 There is another aspect of the matter namely that initially upon declaration of notification under the provisions of the Evacuee Property Act the subject lands vested in the Custodian and formed part of the evacuee pool, thereafter, upon acquisition by the Central Government under Section 12 of the Displaced Persons Act, the same formed part of the Compensation pool. Thereafter the same were allotted to the predecessor of the petitioners and vested in him as an allottee. Once the subject lands vested in the allottee, they lost the character of being evacuee property and became amenable to the laws as applicable to all persons in general, including the Tenancy Act.

The Supreme Court in the case of *Saraswati Industrial Syndicate Ltd. V. State of Haryana (2001) 9 SCC 734* while dealing with the contention that the land was basically an evacuee land and the appellant being a displaced person got it by virtue of entitlement as compensation for what it had lost in the neighbouring country of Pakistan, therefore, that land cannot be taken into consideration for computing excess land, expressed the view that the submission was devoid of substance. The Court observed that no provision of either the Punjab Act or the Haryana Act was brought to its notice to show that such land was exempted from the provisions of those Acts. It was held that once the land is allotted to the appellant and had become its property, it loses the character of being "evacuee property" thereafter; the Collector had, therefore, rightly taken note of the subsequent acquisition of land by the appellant under Section 14-B and recomputed the excess land. Similarly in the present case there is no provision of the Tenancy Act, which excludes lands allotted under the Displaced Persons Act from the provisions of the Act. Moreover as held by the Supreme Court in the

aforesaid decision, once the land was allotted to the petitioners the same lost the character of being evacuee property. If the lands are no longer evacuee property, they become amenable to the laws as applicable to all persons in general, including the Tenancy Act. In that view of the matter, once it is held that the respondent No.1 is a tenant in respect of the subject lands and that the said lands are governed by the provisions of the Tenancy Act, as a natural corollary, the respondent No.1 is entitled to the determination of purchase price of the subject lands.

- 6.16 It may also be apposite to refer to the decision of the Supreme Court in the case of *Sailen Krishna Majumdar v. Malik Labhu Masih*, AIR 1989 SC 1596 upon which reliance had been placed on behalf of the respondent No.1. In the said case the father of the appellant therein had been conferred a gallantry award posthumously by the Government whereby he was granted certain lands in Tehsil and District Layallpur in Pakistan. Consequent to the partition of the country, the family had to migrate to India where the Government allotted certain lands to the appellant as compensation for

the land left behind in Layallpur. The respondent had filed an application under Section 18 of the Punjab Security of Land Tenures Act, 1953. On behalf of the appellant it was contended that in view of Section 19DD of the Punjab Security of Land Tenures Act, the lands granted for gallantry at any time before 26th January 1956 were exempt from the provisions of the Act. The Supreme Court held as follows:

"8. We are referred to the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954. It is an Act to provide for the payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. We have not been shown in it any provision to the effect that any land given as compensation to a displaced person for loss of gallantry award land may imbibe the covenant of exemption available under S. 19DD of the Act. We are consequently of the view that there is no basis for holding that the exemption in respect of the gallantry award land will be available in respect of the land given under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 as compensation for the loss thereof. We find no infirmity in the High Court judgment on this count.

9. Equity is being claimed by both the parties. Under the circumstances we have no other alternative but to let the loss lie where it falls. As the maxim is, 'in aequali jure melior est conditio possidentis'. Where the equities are equal, the law should prevail. The respondent's right to purchase must, therefore, prevail."

6.17 In the present case, equity is being claimed by both, the petitioners as displaced persons as well as the respondent No.1 as tenant. Moreover, in view of the above cited decisions of the Supreme Court, there is no basis for holding that lands granted under the Displaced Persons Act are exempted from the provisions of the Tenancy Act. As can be seen from the order of the Tribunal, the Tribunal has given a finding of fact that the respondent No.1 continues to be a tenant in respect to the subject lands. Under the circumstances, the respondent No.1 being a permanent tenant is, therefore, deemed to have purchased the subject lands under section 32 of the Tenancy Act and is entitled to the determination of the purchase price of the said land in accordance with the provisions of the said Act. The Mamlatdar was, therefore, justified in determining the purchase price of the subject lands under Section 32G of the Tenancy Act, at the instance of the respondent No.1.

7. In the result the respondent No.1 i.e. the petitioner in S.C.A. No.3108/95 succeeds. Special Civil Application No.3108 of 1995 is accordingly

allowed. The impugned order dated 20/7/1994 of the Tribunal dismissing the Revision Application of the respondent No.1, as well as the order dated 31/7/1989 of the Deputy Collector are quashed and set aside and the order dated 22.10.1981 passed by the Mamlatdar is restored. Rule is made absolute accordingly with no order as to costs.

8. Special Civil Application No.1276 of 1995 is rejected. Rule is discharged with no order as to costs.

[HARSHA DEVANI, J.]

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